RECORD
AND
BRIEFS

Nos. 16-285, 16-300, 16-307

IN THE
Supreme Court of the United States

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EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, *et al.*,
Petitioners,
v.
STEPHEN MORRIS, *et al.*,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF COUNCIL ON LABOR LAW EQUALITY, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF EMPLOYERS

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BRIEF OF COUNCIL ON LABOR LAW EQUALITY, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF EMPLOYERS

INTERESTS OF THE *AMICI CURIAE*[1]

Amici represent the interests of thousands of members who use individual arbitration for efficient and cost-effective resolution of legal disputes.

The Council on Labor Law Equality ("COLLE"), a national association of employers, comments on the interpretation of the National Labor Relations Act ("NLRA" or "Act"). COLLE represents NLRA-covered employers in virtually every business sector. COLLE monitors the National Labor Relations Board ("NLRB" or "Board") and the courts in their application of the NLRA. Through *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation and interpretation of national labor policy on issues affecting a broad cross-section of industries.

The National Association of Home Builders ("NAHB") is a Washington, DC-based trade association focused

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amici* state that letters reflecting the parties' blanket consent to the filing of amicus briefs have been filed with the Clerk's office, except the written consent of Petitioner in 16-307 accompanies this brief.

on enhancing the climate for housing and the building industry. NAHB seeks to expand opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of over 700 state and local associations. About one-third of NAHB's 140,000 members are home builders or remodelers, and they construct about 80 percent of new homes annually in the United States. NAHB and its members work for expanding the American dream of home ownership and developing housing that creates vibrant and affordable communities. NAHB is a vigilant advocate in the Nation's courts and frequently participates as a party or *amicus curiae* to safeguard the rights of its members.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 states. Founded in 1943, NFIB seeks to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center is a nonprofit, public interest law firm representing small businesses in the nation's courts on issues affecting small businesses. NFIB's membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports annual gross sales of about $500,000. NFIB's membership reflects American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The Society for Human Resource Management ("SHRM") is the world's largest HR membership

organization devoted to human resource management. Founded in 1948 and representing over 275,000 members in over 160 countries, SHRM is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has over 575 affiliated chapters within the United States and subsidiary offices in China, India, and United Arab Emirates.

These cases are of critical importance to *amici*'s members. Litigation is costly, time-consuming, burdensome, and unpredictable. Many of *amici*'s members use or are considering using individual arbitration to resolve legal disputes fairly and efficiently. *Amici*'s members believe individual arbitration benefits all parties to disputes, including those between employers and employees. The outcome of these cases will likely effect the ability of *amici*'s members to use individual arbitration.

SUMMARY OF ARGUMENT

This Court should overrule *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) (*"Horton"*), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013) (*"Horton II"*) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) (*"Murphy Oil"*), enf. denied in relevant part, 808 F.3d 1013 (5th Cir. 2015) (*"Murphy Oil II"*).[2] Despite

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[2] *Amici*'s counsel Brian Hayes was a Member of the Board but did not participate in *Horton*. Their counsel Ron Chapman, Jr. and Christopher C. Murray successfully represented D.R. Horton before the Fifth Circuit in *Horton II* and other employers challenging *Horton*. *Patterson v. Raymours Furniture Company, Inc.*, 659 Fed. App'x 40 (2d Cir. 2016) (rejecting *Horton*); *Emp'rs Res. v. NLRB*, 2016 U.S. App. LEXIS 19619 (5th Cir. Nov. 1, 2016) (same); *RGIS, LLC v. NLRB*, No. 16-60129 (5th Cir. July 7, 2016)

overwhelming judicial hostility, the Board invokes its policy of nonacquiescence to adhere to those decisions, *Murphy Oil* Pet. App. 22a n.17, and has continued to apply and expand them in over seventy cases.[3] This Court should now reject *Horton*'s reasoning once and for all.

In *Horton*, the Board ruled that the NLRA bars class, collective, and joint action waivers in mandatory arbitration agreements because the NLRA grants covered employees a substantive right to invoke class action, collective action, and joinder procedures ("collective procedures"). *Horton* and its progeny are wrong.

The Board conflates employees' concertedly asserting legal rights with courts' and arbitrators' collectively adjudicating legal claims. The NLRA protects employees from retaliation when they concertedly assert legal rights relating to the terms and conditions of their employment. Federal, state, and local rules of procedure or parties' arbitration agreements govern a decision maker's adjudication of an employee's legal claims. This Court has already held litigants do not

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(per curiam) (same); *see also Hobby Lobby Stores, Inc. v. NLRB*, No. 16-3162 (7th Cir.) (pending).

[3] NLRB GC Mem. 17-02 (3/10/17) at unnumbered pages 28-30 (collecting cases); *see also Countrywide Fin. Corp.*, 362 NLRB No. 165 (Aug. 14, 2015) (employer violated NLRA by moving to compel individual arbitration under arbitration agreement ***silent*** regarding class procedures consistent with *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)); *200 East 81st Rest. Corp. d/b/a Beyoglu*, 362 NLRB No. 152 (July 29, 2015) (every individual employee's filing of an employment-related class or collective action is presumptively "an attempt to initiate, to induce, or to prepare for group action" and concerted activity under *Horton*).

possess a substantive right to specific adjudicatory procedures.

Because the Board cannot require decision makers to exercise their discretion to allow joinder, collective certification, or class certification under standards unrelated to the NLRA, a purported NLRA right to "invoke" collective procedures would be incoherent. Before *Horton*, no authority ever suggested employees might possess such a right under the NLRA, a statute that governs bargaining, not adjudicating.

The Board has no authority to grant employees a substantive right to invoke collective procedures. The NLRA does not delegate to the Board the power to regulate procedures that other decision makers use to adjudicate legal claims under other statutes and law. The Board's interpretation of Federal Rule of Civil Procedure 23 ("Federal Rule 23") as creating procedures to which employees have a substantive right under the NLRA violates the Rules Enabling Act ("REA"), which prohibits using the Federal Rules to enlarge or modify substantive rights.

The Board's interpretation in *Horton* also trenches upon statutes and policies outside the Board's jurisdiction and expertise, including the Federal Arbitration Act ("FAA"), the Federal Rules, the Fair Labor Standards Act ("FLSA"), and other laws addressing adjudication. Invoking collective procedures is not the equivalent of engaging in "concerted legal activity," nor is it inherently concerted. Invoking collective procedures is also connected with a plaintiff's concerns ***as a litigant,*** not his or her concerns as an employee. Finally, the Board has no authority to allocate to employees a substantive right to invoke procedures to increase their power in negotiating litigation settlements.

Although these cases might be decided solely under the FAA, the Court should also hold the NLRA does not provide a substantive right to invoke collective procedures. Not all employees are covered by the FAA. 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). And not all arbitration agreements are covered by the FAA. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008). The enforceability of individual employment arbitration agreements outside the FAA might remain in question unless this Court also rejects the misinterpretation of the NLRA underlying the questions certified. *E.g.*, *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195 at 13 (May 18, 2016) (individual arbitration agreements with truck drivers were unenforceable under NLRA because drivers were exempt from the FAA).

ARGUMENT

I. STANDARD OF REVIEW

A. The Board's decisions are not entitled to deference because they interpret law other than the NLRA and unreasonably construe the NLRA.

This Court reviews *de novo* the Board's interpretation of law outside the NLRA. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202-03 (1991). The Court applies *Chevron* in reviewing the NLRB's construction of the NLRA. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398 (1996). "First, always, is the question whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842–43. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the

precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9.

When there is no directly expressed Congressional intent on precise questions, the Court does not defer to the Board's interpretations if they are not rational and consistent with the Act. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 576 (1994). The Board's constructions of the NLRA must be reasonable and permissible. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975). Although the Board may balance conflicting interests in formulating national labor policy, *NLRB v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 499 (1960), courts must ensure the Board's remedial preferences do not "potentially trench upon federal statutes and policies unrelated to the NLRA," *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). "[T]he Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Courts refuse to defer to the Board's interpretations where they attempt to usurp "major policy decisions properly made by Congress." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965). *See also Ins. Agents' Int'l Union*, 361 U.S. at 499 ("[T]he Board's resolution of the issues here amounted . . . to a movement into a new area of regulation which Congress had not committed to it."); *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) ("Deference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'").

Because *Horton* and *Murphy Oil* interpret law other than the NLRA, including the FAA, the Federal Rules, and the FLSA, and provide an unreasonable construction of the NLRA, those decisions are not entitled to deference.

B. In *Murphy Oil*, the Court reviews the Board's reasoning without substituting its own pursuant to *Chenery*.

In reviewing an agency decision, it is "the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2710 (2015). Under the *Chenery* doctrine:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. ***If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.***

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (emphasis added).

In *Murphy Oil*, the Board affirmed and adhered to *Horton*. *Murphy Oil* Pet. App. 22a. This Court should review the Board's reasoning articulated in *Horton* and endorsed by *Murphy Oil* without substituting an alternative basis for those decisions. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721 (2001). Even if this Court believed the Board reached the right result (which it did not) but for the wrong

reasons, it should refuse to enforce the Board's order. *E.g.*, *Prill v. NLRB*, 755 F.2d 941, 942 (D.C. Cir. 1985) ("We express no opinion as to the correct test of 'concerted activities;' we require only that the Board . . . reconsider this matter free from its erroneous conception of the bounds of the law.").

C. In *Lewis* and *Morris*, the courts' conclusion that Section 7 *unambiguously* provides a right to invoke collective procedures conflicts with the Board's decisions.

The Seventh and Ninth Circuits, apparently unpersuaded by *Horton*, disagreed with the Board's reasoning for finding class waivers unenforceable. Unlike the Board, both courts held Section 7 ***unambiguously*** grants employees a right to access collective procedures. *Lewis* Pet. App. 7a; *Morris* Pet. App. 11a.

The courts' finding of non-ambiguity departed significantly from *Horton / Murphy Oil*. The Board construed Section 7 to guarantee employee access to collective procedures as a matter of federal labor policy. *Horton,* 357 NLRB at 2281-82, 2284, 2285-88; *Murphy Oil* Pet. App. 38a-40a, 48a (*Horton* "identif[ied] Federal labor policy and [sought] an accommodation between Federal labor policy and the Federal policy favoring arbitration"), & 66a n.86. In *Horton,* the Board:

- Reviewed Board precedent construing "concerted activities" for "mutual aid or protection" to cover the collective pursuit of workplace grievances, 357 NLRB at 2278-79;
- Applied *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to hold mandatory individual arbitration agreements function as workplace rules that restrict protected activity, *id.* at 2280;

- Relied on cases finding that certain individual employment agreements interfered with collective bargaining and ordering employers cease and desist enforcement, *id.* at 2280-81;
- Considered whether finding an arbitration agreement unlawful based on the Board's interpretation of the NLRA and the "core principles of Federal labor policy" would conflict with the policies underlying the FAA and, if so, how the Board could undertake a "careful accommodation" of those policies, *id.* at 2284;
- Found, to the extent the FAA conflicts with the NLRA, the FAA was repealed by the Norris–LaGuardia Act ("NLGA"), *id.* at 2288; and
- Concluded *Stolt-Nielsen*, 559 U.S. 662, and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) were not controlling because the Board was not mandating class arbitration but holding an employer could "leave[] open a judicial forum for class and collective claims" to satisfy Section 7, *id.*

The Board adhered to *Horton* in *Murphy Oil*. *Murphy Oil* Pet. App. 31a-74a.

The Seventh Circuit ignored much of *Horton*'s reasoning and instead analyzed Section 7's "text, history, and purpose." *Lewis* Pet. App. 5a. The Seventh Circuit:

- Interpreted Section 7's text using dictionary definitions of "concerted" and "activities" absent from the Board's decisions, *id.*;
- Concluded Section 7's "concerted activity" ***unambiguously*** applies to "collective lawsuits," *id.* at 7a, "the plain language of Section

7 encompasses [collective legal proceedings]," and "Section 7's plain language controls, and protects collective legal processes," *id.* at 9a;

- Concluded the NLRA renders arbitration agreements waiving collective procedures "illegal", *id.* at 14a-15a; and
- Reasoned there is no conflict between the NLRA and the FAA because the FAA's savings clause provides arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and "[i]llegality is one of those grounds." *Id.* at 15a.[4]

The Ninth Circuit similarly held Section 7 was unambiguous and did not defer to *Horton/Murphy Oil*. *Morris* Pet. App. 6a ("The intent of Congress is clear from the statute . . . .").[5]

By departing from the Board's reasoning and finding Section 7 unambiguous, *Lewis* and *Morris* created another split in the law. If *Lewis* and *Morris* were correct (which they were not) that Section 7 ***unambiguously*** provides a right to collective procedures, then the Board's reasoning was wrong, and

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[4] *Lewis* noted if Section 7 were ambiguous, the Court would defer to the Board's reasoning, which it inaccurately characterized as "in accordance with" its own. *Id.* at 7a.

[5] *Lewis* and *Morris* also departed from the Board's arguments in its *amicus* briefs relying on federal labor policy. NLRB *Amicus* Br. 8-9, *Lewis*, No. 15-2997 (7th Cir. Dec. 16, 2015) (The "Board's construction of Section 7 to encompass concerted legal activity . . . reflects the Board's judgment that legal activity accomplishes the congressional goal of avoiding strife and economic disruptions with particular effectiveness."); NLRB *Amicus* Br. 8-9, *Morris*, No. 13-16599 (9th Cir. Nov. 6, 2015) (same).

Murphy Oil would be unenforceable under *Chenery*.[6] If the Board were correct (which it was not) that it has authority to construe the NLRA to provide a right to invoke collective procedures as a matter of federal labor policy, then *Lewis* and *Morris* misread the NLRA as unambiguous and wrongly appear to eliminate the Board's discretion under *Chevron*'s second step. Although unacknowledged by those courts, advocates of the *Horton* rule might argue *Lewis* and *Morris* foreclose the Board's ability to modify the law in this area, including its ability to reconsider *Horton / Murphy Oil* based on its reassessment of labor policy and further experience. *Compare Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992) ("By reversing the Board's interpretation of the statute for failing to distinguish between the organizing activities of employees and nonemployees, we were saying, in *Chevron* terms, that § 7 speaks to the issue of nonemployee access to an employer's property.") *with Weingarten*, 420 U.S. at 265–266 ("The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking.").

This split among the Board, the Seventh Circuit, and the Ninth Circuit is further highlighted by the

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[6] Remand under *Chenery* would not be a formality. *Cf.* Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 210 ("[W]hen agency action is statutorily compelled, . . . remand in such a case would be but a useless formality."). Open questions would remain, such as whether individual arbitration agreements with opt-out provisions may be permitted as a matter of agency discretion. *See infra* at 12-13.

Ninth Circuit's approval of individual arbitration agreements if they allow employees to opt out. *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1076 (9th Cir. 2014); *Morris* Pet. App. 9a n.4. The Ninth Circuit's holding conflicts with a Board decision extending *Horton* to invalidate such agreements. *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189 (Aug. 27, 2015), enf. denied, *On Assignment Staffing Servs., Inc. v. NLRB*, 2016 WL 3685206 (5th Cir. June 6, 2016). For its part, the Seventh Circuit criticized *Johnmohammadi* because the "Ninth Circuit, without explanation, did not defer to the Board" on this issue, although the Seventh Circuit failed to explain why such deference would be required if Section 7 were unambiguous as it had reasoned. *Lewis* Pet. App. 11a.

Horton / Murphy Oil, *Lewis*, and *Morris* – which are inconsistent with overwhelming authority and one another – should be rejected. Section 7 does not grant employees a right to invoke collective procedures or authorize the Board to construct such a right.

II. THE NLRA DOES NOT GRANT A SUBSTANTIVE RIGHT TO INVOKE COLLECTIVE PROCEDURES.

As the employers in these cases persuasively show, the Board, Seventh Circuit, and Ninth Circuit misapplied the FAA and this Court's FAA precedent. *Amici* endorse their arguments. *Murphy Oil*, *Lewis*, and *Morris* are also wrong for another reason: the NLRA does not provide employees a substantive right to invoke collective procedures.

A. A right under the NLRA to invoke collective procedures would be incoherent.

The NLRA right identified by the Board is incoherent because Section 7 cannot mandate class, collective, or joint proceedings. The Board recognized courts can deny employees' motions for class certification under applicable standards irrespective of its interpretation of the NLRA.[7] The Board concedes Section 7 cannot grant employees a "right to class certification" and employers may oppose employees' motions for class certification. 357 NLRB at 2286 & n.24; *Murphy Oil* Pet. App. 43a n.44 & 60a-61a.

To finesse these difficulties, the Board reasoned Section 7 grants employees only a limited right: "to take the collective action inherent in ***seeking*** class certification, whether or not they are ultimately successful under Rule 23" and "to act concertedly by ***invoking*** Rule 23, Section 216(b), or other legal procedures." 357 NLRB at 2286 (emphasis added). Under the Board's logic, the right Section 7 protects is not to proceed as a class but only to ask for class certification "without employer coercion, restraint or interference." *Id.* at 2286 n.24.

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[7] Rule 23, for example, "imposes stringent requirements for certification that in practice exclude most claims." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). The use of collective procedures also ***is subject to judicial or arbitrator discretion***. Employees in similar circumstances may receive different decisions from different judges. *E.g.*, *Noon v. Sailor*, 2000 WL 684219, at *2 (S.D. Ind. Apr. 17, 2000) ("[A] motion to certify a class calls upon a district judge to exercise his or her discretion, within the bounds of the law," and "[i]t should not be surprising that different judges may, on occasion, exercise their discretion in different ways with respect to similar questions.").

But this limited NLRA right (to act concertedly by ***invoking*** collective procedures and ***seeking*** class certification whether or not successful) makes no sense in practice. Because employers concededly may oppose class certification without regard to Section 7's concerns, the Board cannot rationally delineate what employer conduct unlawfully coerces, restrains, or interferes with this purported NLRA right. Under the Board's own terms, an individual arbitration agreement does not abridge a right to ***invoke*** collective procedures, any more than does an employer's filing an opposition to an employee's motion for class certification. This is because an individual arbitration agreement ***does not prevent employees from filing a class complaint or class certification motion that*** **invokes** ***collective procedures*** – which is the only right Section 7 supposedly protects. Under an individual arbitration agreement, the employer may respond to a class complaint or class certification motion by moving to compel individual arbitration. But the Board fails to articulate a rational difference ***for Section 7 purposes from the employee's perspective*** between an employer's responding to a class complaint with a successful motion to compel individual arbitration and responding with a successful opposition to class certification, which the Board concedes is permissible. ***In each instance, by the time the employer files its motion, the employee will have already taken the alleged "collective action inherent in seeking class certification" and acted concertedly by "invoking" collective procedures whether or not successful.*** In either

case, the employees will have fully exercised the very narrow Section 7 right that *Horton* defines.[8]

The Board can identify no purpose under the NLRA to be served by a right merely to ask for class/collective certification, which employers may lawfully oppose and courts deny for reasons irrelevant to the NLRA. *Italian Colors* forecloses any argument employees might have a non-waivable right under federal law to try to satisfy Rule 23's or other class procedural requirements on their merits. *Italian Colors,* 133 S. Ct. at 2310. The Board's attempt to overcome its inability to order collective proceedings by construing Section 7 to grant only a right to ***invoke*** collective procedures fails in practice and logic.

B. Even if a right to invoke collective procedures were meaningful, the NLRA does not unambiguously grant it.

The Seventh and Ninth Circuits' holdings that Section 7 ***unambiguously*** grants a right to invoke collective procedures conflict with the Board's decisions in *Horton* and *Murphy Oil*. *Supra* at 9-12. Those courts' easy discernment of unambiguous

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[8] Additionally, consider a single employee who files a putative class action. The employer pays the employee for his resigning voluntarily, releasing his claims, and dismissing his suit before he moves for class certification. Does this settlement agreement unlawfully restrain the employee's exercise of Section 7 rights? Or the employer deposits the full amount of the employee's individual claim in an account payable to the employee, the court enters judgment for the employee in that amount, and the employer moves to dismiss the case as moot before the employee moves for class certification. *Cf. Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). Does this employer conduct violate the NLRA?

Congressional intent in Section 7 is also at odds with nearly 80 years of precedent demonstrating the term "concerted activit[y]" in Section 7 rarely compels specific interpretations. *E.g.*, *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830-37 (1984); *Weingarten*, 420 U.S. at 266–67. It is well established Congress did not generally speak to "precise questions" in the NLRA or Section 7. *Compare Chevron*, 467 U.S. at 842–43 & n.9, *with Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) ("The [NLRA] did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice."); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).[9]

To the extent Section 7 is unambiguous regarding collective procedures, it unambiguously ***excludes*** them by the NLRA's silence concerning adjudicatory procedures, which are outside the statute's purpose. Section 7's text and legislative history do not mention collective procedures. *Horton II*, 737 F.3d at 360-361. This is unsurprising. The FLSA's collective action provision, Section 216(b), was not adopted until three years after the NLRA's 1935 enactment, and the contemporary procedures for "certifying" collective actions under Section 216(b) were developed by courts only in the 1980s. *Hoffmann-La Roche, Inc. v.*

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[9] Although many of this Court's decisions interpreting the NLRA pre-date *Chevron*, they are consistent with its framework. *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 134 (1987) (Scalia, J., concurring). With rare exceptions, those decisions begin their review of Board decisions at the equivalent of *Chevron*'s second step. *Supra* at 7; *but see Lechmere*, 502 U.S. at 537 (Section 7 creates a distinction "of substance" in *Chevron* terms between employees and non-employees for certain purposes); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

Sperling, 493 U.S. 165, 169, 173 (1989). The modern class action did not exist in federal courts until 1966, over 30 years after the NLRA was enacted. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-15 (1997). It is nonsensical to suggest Congress ***unambiguously*** granted a right under Section 7 to invoke adjudicatory procedures that did not exist when Section 7 was passed.

Lewis's speculation that "Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA" lacks citation to any Congressional authority and misconstrues the history of group litigation procedures. *Lewis* Pet. App. 9a. The Seventh Circuit claimed class and collective action procedures "had existed for a long time on the equity side of the court" and "representative and collective legal procedures have been employed since the medieval period." *Id.* at 8a. But *Lewis*'s superficial history glosses over dates and gets the essentials wrong. Although "[t]he origins of the class action can be traced back to medieval times, . . . it was not originally designed to enable a collection of unrelated individuals to assert a claim for money damages against a common defendant." John C. Coffee, Jr., *Entrepreneurial Litigation* 52 (2015). The older equity cases noted by the Seventh Circuit instead "tended to involve closely knit groups" with "preexisting relationships." *Id.* And the view that collective procedures might aggregate and facilitate the litigation of small money damages claims first arose with a law review article in 1941, six years after the NLRA was enacted. *Id.* (citing Harry Kalven, Jr. and Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684 (1941).) That article appeared three years after the Federal Rules were adopted and "had no influence on those rules." *Id.* at 54. Between 1938 and

1966, the closest thing to the modern class action in federal court was then-Rule 23's "spurious" class action device, but even that "did not intend the aggregation of thousands of persons into a united action for money damages." *Id.* at 55. Instead, it was apparently intended only as a "permissive" joinder device. *Id.* Not until 1966 did the Federal Rules Committee fashion "an entirely new Rule 23," creating the modern class action. *Id.* at 60.

Lewis failed to cite any case from 1935 or earlier in which an employee brought a representative action for money damages on behalf of others. The Seventh Circuit's conclusion Congress "was aware" in 1935 of the procedures at issue here – years before they existed – lacks any basis. *Cf. Concepcion*, 563 U.S. at 349 ("[C]lass arbitration was not even envisioned by Congress when it passed the FAA in 1925."). And *Lewis*'s and *Morris*'s holdings that Congress ***unambiguously*** granted a right to invoke collective procedures under Section 7 should be rejected out of hand.

C. No precedent holds the NLRA grants employees a right to invoke collective procedures.

The Fifth Circuit correctly held the "'use of class action procedures . . . is not a substantive right' under Section 7 of the NLRA." *Murphy Oil* Pet. App. 5a (quoting *Horton II*, 737 F.3d at 362).[10] The Fifth

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[10] The Board wrongly asserts the Fifth Circuit "did not take issue with the Board's expert interpretation of Section 157." *Murphy Oil* Pet. 12. To the contrary, the Fifth Circuit rejected the Board's interpretation that Section 7 provides a substantive right to class procedures. *Murphy Oil* Pet. App. 5a

Circuit's view is consistent with eight decades of precedent.

1. *Eastex* did not recognize a Section 7 right to invoke collective procedures.

The Board, *Lewis*, and *Morris* all cited *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) as though this Court already determined the NLRA grants employees a right to invoke collective procedures. *Horton*, 357 NLRB at 2278; *Lewis*, 823 F.3d at 1152; *Morris*, 834 F.3d at 982 n.3. All mischaracterized *Eastex*.

Eastex involved a union's distribution of a newsletter urging employees to write to their legislators to oppose a right-to-work law and criticizing a presidential veto of a minimum wage law. 437 U.S. at 568-70. The employer contended this activity was not within Section 7's "mutual aid or protection" clause because it did "not relate to a 'specific dispute' between employees and their own employer 'over an issue which the employer has the right or power to affect.'" *Id.* at 563. This Court disagreed. It held this activity was protected because Section 7 can cover employees when they seek "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Id.* at 565. For context, the Court observed:

> Thus, it has been held that the "mutual aid or protection" clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to

> protect their interests as employees are within the scope of this clause.

Id. at 565-66.

The Board, *Lewis*, and *Morris* failed to recognize that *Eastex*'s reference to "resort to administrative and judicial forums" was *dicta* and this Court qualified that *dicta* by declaring "***[w]e do not address here the question of what may constitute 'concerted' activities in this context.***" *Id.* at 566 n.15 (emphasis added). The question presented here – what might constitute "concerted" activities in the context of resort to judicial and other forums – was expressly reserved by *Eastex*.

2. *Salt River Valley* did not recognize a Section 7 right to invoke collective procedures.

Horton also mischaracterized *Salt River Valley* as impliedly recognizing a right to invoke collective procedures. 357 NLRB at 2279.[11] That case actually demonstrates that "concerted legal activity" is not synonymous with class proceedings. There, employees believed they were due wages under the FLSA. *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 863-64 (1952). One employee circulated a petition through which co-workers designated him "to take any and all actions necessary to recover for [them] said monies, whether by way of suit or negotiation, settlement and/or compromise" and authorized him to employ an attorney. *Id.* at 864. His employment was soon terminated.

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[11] *See also Murphy Oil* Pet. App. 32a n.24 & 56a.

The Board ignores the fact that the employees in *Salt River Valley* never sued or invoked collective procedures. Rather, their "concerted legal activity" occurred ***outside*** any adjudicatory proceeding. That protected conduct involved the employees' attempting to exert group pressure on their employer to negotiate a settlement of their demands by circulating a petition and pooling resources to finance possible litigation. *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953).

Strikingly, the Board identified no "concerted legal activity" undertaken by the employees in *Salt River Valley* that an individual arbitration agreement would prevent. That case shows Section 7 does not grant a right to invoke collective procedures but rather protects employees from retaliation when they concertedly assert legal rights.

3. No other precedent has recognized a Section 7 right to invoke collective procedures.

The other unfair labor practice decisions cited by the Board also fail to suggest the NLRA grants employees a right to invoke collective procedures. The prior decisions referring to legal proceedings show only that employers may not retaliate against employees for jointly filing a legal complaint, grievance, and administrative charge that asserts employment-related legal rights. 357 NLRB at 2278-79 & n.4.[12] None suggests

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[12] These decisions are also distinguishable because an employer's moving to compel individual arbitration is not retaliation. And unlike discharging employees for concerted activity, requiring individual arbitration agreements as a condition of employment is consistent with federal policy under the FAA. *See Circuit City*, 532 U.S. at 122-23.

employees have a right under the NLRA to invoke specific procedures for adjudicating their legal claims.

The Board also could cite no decision holding the NLRA renders contracts unenforceable because they allegedly interfere with employees' ability to invoke collective procedures. The Board cited only decisions enforcing the Board's remedial orders that specific employers cease and desist from enforcing individual employment agreements based on evidence those employers used those agreements to interfere with collective bargaining. *Horton*, 357 NLRB at 2280-81 & n.7.[13]

Moreover, the cases cited by the Board voiding individual agreements all pre-date *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). There, an employer claimed it need not bargain collectively because it had already entered individual agreements with employees prior to a certification of the union as their exclusive bargaining representative. This Court did ***not void the individual agreements*** but held their existence did not excuse the employer from bargaining collectively because the individual agreements would be superseded by any resulting collective bargaining agreement. *Id.* at 336-38.[14]

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[13] The Board also wrongly relied on *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), failing to note the NLRA provision at issue in that case, Section 8(e), ***expressly*** voids certain contracts, unlike Section 8(a)(1). 357 NLRB at 2287; *Murphy Oil* Pet. App. 44a n.47.

[14] Under *J.I. Case*, if a union came to represent Murphy Oil's, Epic Systems', or Ernst & Young's employees and the parties entered a collective bargaining agreement, that agreement might ***supersede*** individual arbitration agreements, but *J.I. Case* does not otherwise void those agreements. *Cf. Johnmohammadi*, 755 F.3d at 1076-77.

No precedent supports the view that the NLRA renders individual arbitration agreements unenforceable or "illegal."

III. THE BOARD LACKS AUTHORITY TO GRANT EMPLOYEES A NEW RIGHT TO INVOKE COLLECTIVE PROCEDURES.

While the Board may have responsibility "to adapt the Act to changing patterns of industrial life," reviewing courts "are of course not 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act." *Weingarten,* 420 U.S. at 266 (citation omitted). Courts must ensure the Board's remedial preferences do not "potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic*, 535 U.S. at 144.

Even if the NLRA did not unambiguously ***exclude*** an alleged right to invoke collective procedures, the Board's attempt to construct such a right would not be entitled to deference because the Board "wholly ignore[d] other and equally important Congressional objectives." *Southern S.S. Co.*, 316 U.S. at 47. The Board's attempt to recognize this new right runs contrary to the language and tenor of the Act and trenches upon laws and policies outside the Board's expertise and authority.

A. A purported NLRA right to invoke collective procedures conflicts with the Rules Enabling Act.

This Court has already made clear that the "right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332

(1980). The Board's attempt to construct a substantive right under the NLRA to invoke those procedures conflicts with the Rules Enabling Act ("REA"), which the Board failed to cite or address.

In the REA, Congress delegated authority to this Court to promulgate the Federal Rules. 28 U.S.C. § 2072(b). The REA provides the Federal Rules "shall not abridge, enlarge or modify any substantive right." *Id.* In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, a Court plurality explained a rule of procedure is valid under the REA only if it "really regulat[es] procedure, – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." 559 U.S. 393, 406 (2010) (internal quotation marks and citation omitted). The plurality reasoned Rule 23 is permissible because:

> A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

Id. at 408 (emphasis added).

Here, the Board erroneously treats Rule 23 as ***enlarging*** substantive rights under the NLRA and ***abridging*** them under the FAA. On one hand, the Board contends employees have a substantive right under the NLRA to invoke Rule 23 and seek class certification. ***But a "right" to invoke Rule 23 could not exist without the rule itself.*** Consider a hypothetical in which Rule 23 were never promulgated.

Section 7 standing alone would not provide employees a right to seek class certification in federal court. Under the Board's view, this purported non-waivable right grew out of Section 7 with Rule 23's adoption. The Board treats Rule 23 as expanding employees' substantive rights under Section 7, which the REA prohibits.

Simultaneously, the Board treats Rule 23, when combined with Section 7, as ***abridging*** parties' substantive rights under the FAA to agree to procedures governing their arbitrations. If the Board were correct, this outcome also would violate the REA. *See Italian Colors*, 133 S. Ct. at 2309-10 (an entitlement to class proceedings would abridge or modify substantive rights in violation of the REA); *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487-88 (2d Cir. 2013) (under the REA, "Rule 23 cannot create a non-waivable, substantive right to bring" a pattern-or-practice class action under Title VII).

B. Invoking collective procedures is not the same as engaging in "concerted legal activity" under the NLRA.

The Board also erred by treating "concerted legal activity" (a term not found in the NLRA) as synonymous with invoking collective procedures. But if "concerted legal activity" means employees' concerted assertion of legal rights or pursuit of legal claims, such activity does not require, and is not the equivalent of, invoking collective procedures.

In his partial dissent in *NLRB v. Alternative Entertainment Inc.*, 2017 WL 2297620, at *15 (6th Cir. May 26, 2017) (Sutton, J., dissenting in part), Judge Sutton noted the "key question, which the Board and the majority do not confront, is what makes . . . a

lawsuit 'concerted.'" Although the "Board assumes that, when a court or arbitrator consolidates employees' claims through a class action or joinder, the employees litigate concertedly," in reality, "the 'concertedness' of litigation does not turn on the particular procedural form that litigation takes." *Id.* Rather, "[a]n activity is 'concerted' as long as workers mutually plan and support it." *Id.* Judge Sutton explained:

> Whether a group of employees brings a class action, joint claims, separate claims, or whether the group supports a single-plaintiff suit, their legal action is protected if they are substantively cooperating in the litigation campaign—say by pooling money, coordinating the timing of their claims, or sharing attorneys and legal strategy. These are the sort of collaborative activities—which employees can engage in of their own accord and not at the leave of a judge—that Section 7 protects.

Id. Employees cannot "mutually contrive or agree" to litigate as a class, because "[a] judge or arbitrator makes the decision to group claims together based on the procedural rules of the forum." *Id.* "It would make little sense for the 'concertedness' of a litigation campaign to turn on judicial decisions over which workers have no control." *Id.*

Judge Sutton is correct. As exemplified by *Salt River Valley*, *see supra* at 21-22, employees may engage in "concerted legal activity" without regard to collective procedures. Irrespective of such procedures or their waiver, employees can work together to pursue legal claims and assert legal rights by, among other things, (1) pooling their finances, (2) making joint demands and negotiating as a group, (3) sharing information,

(4) soliciting other employees to assert the same legal rights, (5) acting in concert to initiate multiple individual suits alleging the same legal claims, (6) obtaining common representation, (7) jointly investigating their legal claims, (8) developing common legal theories and strategies, and (9) testifying for one another. *Cf.* Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. Rev. 43, 92 (2011) ("[A]n agreement to arbitrate rather than litigate, and to arbitrate only on an individual basis, does not mean that employees cannot act in concert with their coworkers when they pursue individual grievances. Rather, it limits only the scope of discovery, the hearing, the remedy, and the employee population bound by an adverse decision on the merits.").

Individual arbitration agreements do not, and cannot, prevent employees from engaging in "concerted legal activity," as federal dockets show. *See, e.g.*, Compl. ¶¶ 1 & 2, *20/20 Communic'ns, Inc. v. Blevins et al.*, No. 4-16cv-810-A (N.D. Tex. Aug. 31, 2016), ECF No. 1 (noting 18 current and former employees subject to individual arbitration agreements filed coordinated individual arbitrations represented by same attorney alleging same claims); Aff. Rebecca S. Predovan ¶¶ 1-10, *Kicic v. Hobby Lobby Stores, Inc.*, Case No. 2:16-cv-197 (S.D. Ind. June 24, 2016), ECF No. 16-1 (noting two former employees subject to individual arbitration agreements were represented by the same attorneys and simultaneously filed individual arbitrations alleging same claims).

C. Invoking collective procedures is not inherently concerted activity under the NLRA.

The Board further errs by treating invoking collective procedures as inherently concerted activity. 357 NLRB at 2279 ("Clearly an individual who files a class or collective action regarding wages, hours or working conditions . . . seeks to initiate or induce group action and is engaged in conduct protected by Section 7."); *Murphy Oil* Pet. App. 57a; *200 East 81st Rest. Corp.*, 362 NLRB No. 152.

The Board, opining on procedures outside its expertise, is wrong. Under Federal Rule 23 and Section 216(b), plaintiffs can, and often do, file class/collective actions for their individual benefit. A plaintiff's attorney may include class/collective allegations in a complaint to raise the stakes for the defendant and obtain a quicker or larger settlement ***on behalf of that individual plaintiff***.[15]

The plaintiff (and her attorney) who files a class action complaint may never intend to induce group action. The attorney who represented the charging party in *Horton* is one example. That attorney routinely files FLSA complaints with a single plaintiff but invoking collective procedures; he does not move for collective certification; no other individual opts into the case; and he settles the case ***as a single-plaintiff***

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[15] Merely filing of a putative class/collective action may impose significant costs by placing the defendant under a duty to preserve potentially relevant evidence relating to the putative class/collective. Plaintiffs may argue such duties arise ***prior*** to certification. *E.g., Pippins v. KPMG LLP*, 2011 WL 4701849, at *3 & 6 (S.D.N.Y. Oct. 7, 2011) (employer incurred over $1.5 million in expenses to preserve putative class members' hard drives prior to certification decision).

lawsuit. *See, e.g., Phillip v. Angels Exp. Delivery Serv., Inc.*, No. 8:11-cv-00312 (M.D. Fla.), ECF No. 1 (collective action complaint under FLSA on behalf of single plaintiff) & ECF No. 24 ¶ 7 (motion to approve individual settlement under which plaintiff received $2,000.00 in alleged back wages and her attorney $7,500.00 in fees); *Olvera v. Fla. Aluminum & Steel, Inc.*, No. 2:10-cv-00425 (M.D. Fla.), ECF No. 1 (collective action complaint under FLSA on behalf of single plaintiff) & ECF No. 38 ¶ 6 (motion to approve individual settlement). Other attorneys pursue the same strategy. *See, e.g., Rosser et al. v. RTC Resource Acquisition, Corp.*, No. 1:09-cv-792 (S.D. Ind.), ECF No. 1-3 (collective action complaint) & ECF No. 28 (motion to dismiss based on individual settlement).

D. Invoking collective procedures is connected to the concerns of plaintiffs as *litigants*, not as employees.

The Board fails to acknowledge that not all "concerted" employee activity is protected by Section 7. *Eastex* teaches that "some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity" and that "at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Id.* at 567-68. Thus "[t]here may well be types of conduct . . . that are . . . so remotely connected to the concerns of employees ***as employees*** as to be beyond the protection of the clause." *Id.* at 570 n.20 (emphasis added).

Applying *Eastex*, courts and the Board have repeatedly found concerted employee activity was not protected when it was insufficiently connected to employees' concerns as employees. *E.g., Tradesmen*

Int'l, Inc. v. NLRB, 275 F.3d 1137, 1141, 1143 (D.C. Cir. 2002) (employer did not violate Section 7 by refusing to hire union organizer after he lobbied city government to require employer to pay a bond for work performed within the city because lobbying was an effort to raise employer's costs rather than improve working conditions); *Office & Prof'l Emps. Int'l Union v. NLRB*, 981 F.2d 76, 78 (2d Cir. 1992) (running for office in a union that had no bargaining relationship with employer was not protected because activity was "completely unrelated to the employer-employee relationship"); *Harrah's Lake Tahoe Resort Casino*, 307 NLRB 182 (1992) (although employee's distribution of petition at work advocating that employee stock option plan purchase a 50% share of employer's parent company was "concerted" and the purchase might have affected employee benefits, activity was not protected by Section 7 because "the proposal [did] not advance employees' interests as employees but rather advance[d] employees' interests as entrepreneurs, owners, and managers").

Invoking collective procedures, even if concerted, relates to plaintiffs' concerns ***as litigants***, not employees. When a court or arbitrator grants or denies class certification, it is under the procedural standards applicable in the forum without consideration of whether certification might facilitate employees' mutual aid or protection under the NLRA, impact their employment terms, or advance any other interests of the litigants ***as employees***. *Alt. Entm't*, 2017 WL 2297620, at *15 (Sutton, J., dissenting in part) ("All of these procedural requirements [of Rule 23, Section 216(b), and Rule 20] must be met before plaintiffs can proceed collectively, no matter what Section 7 says.").

Before *Horton*, no authority suggested the NLRA governs whether employment-related legal claims should be adjudicated collectively. This is unsurprising, because adjudication is outside the NLRA's scope. The NLRA concerns bargaining between employers and employees regarding terms and conditions of employment. *City Disposal*, 465 U.S. at 845 ("[I]n enacting § 7 . . . , Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). The adjudication of legal claims differs from bargaining; it is "[t]he legal process of resolving a dispute; the process of judicially deciding a case." Black's Law Dictionary (9th ed. 2009) (defining "adjudication"); *see also Shady Grove*, 559 U.S. at 408 (plurality opinion) ("A class action . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.").

Employers and employees bargain, and judges and arbitrators adjudicate. The procedures used by judges and arbitrators to decide legal claims are unrelated to the NLRA's purpose of equalizing employees' and employers' bargaining power. The Board cannot contend employees' legal claims become stronger when adjudicated collectively. An employee who pursues her employment-related legal claim as a member of a 1,000-person class has no greater right under the FLSA or any other law than when she pursues her claim individually. Nor is an employee more likely to receive a favorable judgment by seeking adjudication of her claim in a collective proceeding. Judges and arbitrators adjudicate each party's claims based on the law and facts, ***irrespective of the parties' power***. *See, e.g.*, 28 U.S.C. § 453 (requiring each judge or justice of the United States to swear he or she "will

administer justice without respect to persons, and do equal right to the poor and to the rich").[16]

E. The Board cannot grant employees a right to invoke collective procedures to force settlement.

In *Murphy Oil*, the Board attempted to link adjudication with bargaining. It reasoned "as a practical matter, litigation routinely does involve not only adjudication by a court or arbitrator, but also bargaining between the parties: that is how cases settle, as most of them do." *Murphy Oil* Pet. App. 60a. But the Board is not empowered to determine the adjudicatory procedures employees may invoke – preempting the FAA, the Federal Rules, Section 216(b), state procedural rules, arbitration agreements, and judicial precedent – simply because litigation between employers and employees may involve settlement negotiations.

Perhaps the Board assumes employees' access to collective procedures could increase their leverage in negotiating settlement. Collective procedures can impose on defendants disproportionate costs and the risk of ruin in the event of an erroneous judgment, compelling defendants to settle without regard to the claims' merits. But commentators and courts view this as a problem with class/collective procedures. *See, e.g.*, *Concepcion*, 563 U.S. at 350 (noting "the risk of 'in terrorem' settlements that class actions entail");

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[16] Employment claims do not require aggregation to be effectively vindicated because employment statutes award attorneys' fees and costs to prevailing employees, incentivizing individual claims. *See* 45C Am. Jur. 2d Job Discrimination § 2618. The fees awarded can greatly exceed the employee's damages recovered. *E.g.*, *Cain v. Almeco USA, Inc.*, 2014 WL 2158413, at *1 (N.D. Ga. May 23, 2014); *Diaz v. Jiten Hotel Mgmt., Inc.*, 741 F.3d 170, 172 (1st Cir. 2013).

In re Bridgestone/ Firestone, Inc., 288 F.3d 1012, 1016 (7th Cir. 2002); Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendments) ("An order granting certification . . . ***may force a defendant to settle*** rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." (emphasis added)); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

Nothing in the NLRA authorizes the Board to determine what procedures must be available to employees to increase their power in settlement negotiations. Any increase in bargaining power that invoking collective procedures gives plaintiffs does not result from group employee activity but is the problematic byproduct of adjudicatory procedures. Extracting settlement by using procedures to threaten extreme expenses and risks would be "judicial blackmail," not equalized bargaining based on concerted activity. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

Even assuming *arguendo* settlement negotiations could be viewed as NLRA-covered bargaining, the Board may not choose employers' and employees' respective economic weapons in bargaining. The Board is not authorized to grant employees a right to deploy judicial procedures as an economic weapon or bar employers from using individual arbitration because it may blunt that economic weapon. *See, e.g., Am. Ship Bldg. Co.*, 380 U.S. at 318 ("Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power."); *NLRB v. Brown*, 380 U.S. 278, 283 (1965) ("[T]here are many economic weapons which an employer may use that . . . interfere in some

measure with concerted employee activities . . . and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either § 8(a)(1) or § 8(a)(3). Even the Board concedes that an employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself 'virtually strikeproof.'"); *Ins. Agents' Int'l Union*, 361 U.S. at 499-500 ("[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. . . . [T]his amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced.").

CONCLUSION

For all of the reasons set forth above, *Horton/Murphy Oil*, *Lewis*, and *Morris* were wrongly decided and should be overruled.

Respectfully submitted,

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